No. 05-1157

In the Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,
PETITIONERS

v.

GLEN BILLING, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether an antitrust complaint predicated on alleged collusive activity in the securities markets must, in order to survive a motion to dismiss on grounds of implied antitrust immunity, set forth allegations sufficient to support a reasonably grounded expectation that the plaintiff's claims do not rest on collaborative activities that are either permitted under the securities laws or inextricably intertwined with such permissible activities.

2. Whether conduct that is prohibited under the regulatory scheme governing public offerings of securities is categorically immune from liability under the federal antitrust laws because of the extensive regulatory authority exercised by the Securities and Exchange Commission over such conduct.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Petitioners include investment banks that underwrite initial public offerings (IPOs) of securities, and institutional investors. Respondent Billing and others filed a class action on behalf of persons who purchased certain IPO securities directly or in the aftermarket alleging that petitioners violated Section 1 of the Sherman Act, 15 U.S.C. 1 (Supp. IV 2004). The overarching theory of respondents' complaint, set forth under the heading "Summary of Allegations," is that petitioners agreed "to require from customers consideration in addition to the underwriters' discount * * * for allocations of shares of initial public offerings of certain technology-

related companies * * * and to inflate the aftermarket prices for such Class Securities." Consolidated Amended Class Action Complaint ¶ 1 (Jan. 2, 2002) (Am. Compl.).[1] Respondents allege in general terms that petitioners agreed to impose tie-in arrangements—*i.e.*, that they required IPO customers to pay consideration in addition to the stated offering price for IPO securities, including the payment of inflated commissions on other securities or "commitments to purchase other, less attractive securities." *Id.* ¶¶ 4(a), 6. In addition, petitioners are alleged to have agreed to require "laddering" arrangements—a form of tie-in under which, "in order to obtain IPO shares of a Class Security, customers had to place bids for and/or purchase quantities of such Class Security in the aftermarket at prices above the IPO price." *Id.* ¶¶ 4(b), 7.

More particularly, respondents allege that petitioners "implemented their unlawful * * * agreement through and in connection with their agreements to combine together into underwriting syndicates." Am. Compl. ¶ 49. Petitioners are alleged to have "communicated and worked together as co-underwriters and members of underwriting syndicates" (with lead underwriters using the same co-underwriters repeatedly), "collaborated with one another in trade organizations" and "as members of the National Association of Securities Dealers, Inc.," "combined to create various joint ventures in the securities market," and had "meetings among their top investment bankers, legal officers and marketing managers." *Id.* ¶¶ 45-48, 50. Petitioners are further alleged to have

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[1] The Amended Complaint also alleged violations of state antitrust law. Am. Compl. ¶¶ 84-109. Respondent Pfeiffer's separate class action complaint on behalf of aftermarket purchasers alleged that "the underwriter defendants paid bribes to, or accepted bribes from, the institutional defendants, in a course of conduct designed to inflate the price of particular securities," in violation of Section 2(c) of the Robinson-Patman Act, 15 U.S.C. 13(c). Pet. App. 18a-19a. The focus of this brief, like that of the court of appeals, is the Billing complaint, and references herein to the "complaint" are to the amended complaint filed in that action.

hosted "road shows" and conducted other communications with customers before the IPOs, during which petitioners, "at times jointly, made inquiries of customers or others interested in purchasing Class Securities concerning the number of shares that such person would be willing to purchase in the aftermarket and the prices such person would be willing to pay for such shares." *Id.* ¶ 54. The complaint also alleges that petitioners agreed to disclose to each other the identities of their respective IPO customers and to share data about them, including their trades, "[i]n order to monitor whether the customers complied with the preconditions to receiving allocations." *Id.* ¶ 56.

2. The district court granted petitioners' motion to dismiss the complaints under Rule 12(b)(6), Fed. R. Civ. P., on implied immunity grounds; it did not reach petitioners' arguments that respondents lacked standing and that the complaints failed adequately to allege any antitrust offenses. Pet. App. 72a-122a. The court held that "the [Securities and Exchange Commission (SEC)] explicitly permits much of the conduct alleged" in the complaint, which it described as "a general indictment of the syndicate system" authorized by the securities laws. *Id.* at 86a, 89a; see *id.* at 86a-93a. The court did not, however, limit its dismissal to those claims that were premised on authorized conduct, nor did the court give respondents an opportunity to replead their complaint to specify that their claims are based on conduct that is neither permitted by the securities laws nor inextricably intertwined with such conduct. The district court recognized that the "tie-in, laddering and other aftermarket agreements alleged" in the complaint are prohibited under the securities regulatory scheme, but it concluded that even such conduct enjoyed blanket immunity from antitrust liability in light of the SEC's "broad general authority to regulate IPO allocation and underwriter commission practices." *Id.* at 94a, 103a. The court

dismissed the complaint "with prejudice as against all defendants." *Id.* at 121a.

3. The court of appeals vacated and remanded for further proceedings consistent with its opinion. Pet. App. 1a-71a. The court acknowledged that the underwriting syndicate process, including certain types of manipulations "deemed 'stabilizing' activities," is permitted under the securities laws. *Id.* at 9a. But because the complaint also alleged "tie-in" and "laddering," conduct that the SEC classifies as unlawful manipulation, *id.* at 13a-16a, the court of appeals held that the "heart of the alleged anticompetitive behavior finds no shelter in the securities laws." *Id.* at 4a.[2]

The court of appeals recognized "the guiding principle that, where possible, 'the proper approach'" to the question of antitrust immunity "is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." Pet. App. 49a-50a (quoting *National Gerimed. Hosp. & Gerontology Ctr.* v. *Blue Cross*, 452 U.S. 378, 392 (1981), and *Silver* v. *NYSE*, 373 U.S. 341, 357 (1963)). Under that principle, the court concluded, implied immunity may be found only in two narrowly defined situations. *Id.* at 49a.

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[2] The district court and the court of appeals had requested the views of the SEC and the Department of Justice separately on the issue of implied antitrust immunity. The SEC argued in a letter brief that "antitrust immunity is appropriate in the intensely regulated area of registered offering underwriting to protect the effectiveness of the regulatory regime * * * even in some cases where it may not be clear that the Commission could (or ever would) authorize the specific conduct alleged by particular plaintiffs." Pet. App. 192a. The Department of Justice took the position in a letter brief that petitioners are "entitled to implied immunity for conduct expressly or implicitly approved by the securities laws or SEC regulations," but that "the allegations of tying and laddering—practices that are strictly prohibited under the securities laws and that the SEC has never permitted or proposed to permit—should not be dismissed on implied immunity grounds." *Id.* at 207a. See *id.* at 124a-158a. Neither filing below expressly urged the test advocated in this brief, which reflects the considered view of the United States.

First, the court held that "pervasive regulation" may warrant implied repeal if "the activities of [a self-regulatory organization (SRO)], extensively regulated by the SEC, are challenged as anticompetitive." Pet. App. 50a. When regulatory approval immunizes the underlying restraints, moreover, an SRO's "conduct enforcing those restraints" may acquire "a kind of derivative immunity." *Ibid.* (quoting *Phonetele, Inc.* v. *AT&T*, 664 F.2d 716, 729 (9th Cir. 1981) (Kennedy, J.), cert. denied, 459 U.S. 1145 (1983), and citing *United States* v. *National Ass'n of Sec. Dealers, Inc. (NASD)*, 422 U.S. 694 (1975)).

Second, the court held that implied immunity may be warranted when there is a "potential specific conflict" between "the antitrust laws prohibiting a specific activity * * * and a regulatory regime compelling or permitting that activity." Pet. App. 51a. Based on its analysis of this Court's decision in *Gordon* v. *NYSE*, 422 U.S. 659 (1975), the court identified five factors in potential conflict situations that inform the "touchstone" determination whether Congress intended to repeal the antitrust laws: "(1) congressional intent as reflected in legislative history and a statute's structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency regulation of the anticompetitive conduct; and (5) any other evidence indicating that the statute implies a repeal." Pet. App. 53a, 57a; *id.* at 51a-57a. The court of appeals rejected respondents' contention that "immunity applies to whatever conduct the SEC could permit under its regulatory regime" in favor of "a legal framework *more* favorable to plaintiffs than the doctrine they [or the United States] have pressed." *Id.* at 62a. Respondents had urged that the question respecting conflicting mandates was whether the SEC "could permit" the conduct, *ibid.*, and the United States had urged that the question was whether the conduct alleged in the complaint was "expressly or implicitly

approved by the securities laws or SEC regulations," *id.* at 207a. The court of appeals, in contrast, held that a "potential specific conflict" is a "necessary"—but not sufficient—"component of implied immunity," and "is simply the essential starting point" of the implied immunity analysis. *Id.* at 51a, 53a; see *id.* at 57a.

The court of appeals concluded that neither a pervasive regulation nor a specific conflict rationale justified the district court's order of dismissal. Pet. App. 60a-70a. In rejecting petitioners' pervasive-regulation argument and distinguishing *NASD*, the court of appeals noted that "the NASD and the SEC share a relationship that is quite different from SEC regulation of private business activities," and that the implied immunity in *NASD* was limited to activities that were approved by the SEC or that implemented approved conduct. *Id.* at 67a-70a.

The court of appeals also held, based on its analysis of the *Gordon* factors, that there was no potential for specific conflict between the antitrust and securities laws that warranted implied immunity for the conduct alleged in the complaint. Focusing on the complaint's allegations of tie-in and laddering agreements, the court noted that there is no legislative history suggesting an intent to immunize such conduct, nor would application of the antitrust laws to such conduct be inconsistent with or "render[] nugatory" any provision of the securities laws. Pet. App. 64a-66a. The court saw no "potential for irreconcilable mandates" because neither petitioners nor the SEC urged "the Commission's power to force tie-in conspiracies or to force underwriters to offer tie-in agreements linked to IPO allocations." *Id.* at 64a-65a.

The court of appeals recognized, Pet. App. 61a n.47, that "the complaint details a host of conduct recognized as legitimate by the SEC" but, rather than affirming dismissal of the complaint with respect to such conduct, the court treated the complaint's reliance on permissible conduct as presenting

only a question of the evidence upon which respondents could rely. It found "no basis for grounding the immunity analysis in evidentiary considerations," and viewed the answer to the immunity question as "not vary[ing] with different evidentiary strategies." *Ibid.* It "le[ft] to the district court the task of ensuring that defendants do not suffer prejudice from any evidence of their legitimate activities." *Ibid.* The court also noted that, "'just as regulatory context may in [some] cases serve as a basis for implied immunity, it may also be a consideration' in the application of antitrust law," such as by supporting application of the rule of reason. *Id.* at 58a (quoting *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 412 (2004)).

Accordingly, the court of appeals rejected petitioners' implied immunity defense in its entirety, holding that "we find no [implied] repeal." Pet. App. 70a. The court vacated the district court's dismissal on immunity grounds and remanded for consideration of "alternate grounds to support the district court's dismissal." *Ibid.*

DISCUSSION

The interaction of the antitrust laws with the statutory scheme for regulating public offerings of securities raises difficult and important questions about the proper scope of implied antitrust immunity. The securities regulatory scheme authorizes a broad array of collaborative conduct that might otherwise violate the antitrust laws, and this Court has emphasized the need for a "proper reconciliation of the regulatory and antitrust statutes." *Gordon* v. *NYSE*, 422 U.S. 659, 685 (1975). Neither the approach of the district court nor that of the court of appeals adequately accommodates the interests of those two critically important statutory schemes. Whereas the district court's approach could potentially immunize even blatantly anticompetitive conduct that the securities laws and regulations specifically forbid, the court of appeals' decision fails to protect defendants against the prospect of having to

defend against costly antitrust litigation based on conduct that the securities laws permit, and even encourage.

Although the court of appeals acknowledged that conduct expressly or implicitly authorized under the securities statutes is immune from liability under the antitrust laws, it failed to recognize or give effect to the full scope of that immunity. The court focused its immunity analysis on the complaint's general allegations that petitioners engaged in tie-in and laddering activities that are unlawful under the securities regulatory regime. Recognizing that many of the complaint's more specific factual allegations of actions taken by petitioners in furtherance of their allegedly unlawful agreements detail collaborative conduct that is either specifically permitted under the securities laws or inextricably linked to such permitted conduct, the court treated that problem as an issue to be addressed solely as a matter of evidence. But a complaint's generalized allegations of conduct prohibited under the regulatory scheme should not preclude dismissal on immunity grounds if the complaint's allegations to that effect ultimately rest on collaborative activities that are either permitted under the securities laws or inextricably intertwined with such permitted activities, because such conduct is impliedly immune from antitrust liability. And to the extent the complaint is ambiguous whether the specific conduct on which respondents premise their broad allegations of illegal tie-ins and laddering is itself entitled to immunity, respondents should be required to re-plead to make clear that they are not relying on protected activities as a necessary component of their claim. By categorically rejecting petitioners' immunity defense and thereby foreclosing the district court on remand from dismissing on immunity grounds with leave to re-plead, the court of appeals failed to give adequate effect to the securities laws.

On the other hand, the sweeping immunity urged by petitioners and adopted by the district court fails to give adequate effect to the antitrust laws. Congress has not broadly immu-

nized all conduct that is arguably related to the initial public offering process or to other activity regulated by the SEC. The district court's dismissal of the complaint in its entirety and with prejudice, based on the SEC's "broad general authority to regulate IPO allocation and underwriter commission practices," Pet. App. 94a, is inconsistent with this Court's repeated rejection of "a blanket exemption" from antitrust law for all conduct regulated under another statutory scheme. *National Gerimed. Hosp. & Gerontology Ctr.* v. *Blue Cross*, 452 U.S. 378, 392 (1981). Thus, the court of appeals was correct to vacate the district court's dismissal of the complaint with prejudice.

The question of implied immunity at issue here is an important and recurring one, and this Court's guidance would resolve the continuing confusion in the lower courts about the proper manner in which to reconcile the antitrust laws and the securities laws. Whereas, in the view of the United States, petitioners are not entitled to the sweeping immunity they advocate, clarity on this matter is critical. It is of paramount importance that the capital formation process in this country not be undermined by the threat of treble damages liability based on conduct inextricably linked to the collaborative activities authorized and regulated by the SEC under the securities laws. The court of appeals' decision fails to give adequate protection against that threat. As a practical matter, moreover, absent review by this Court, the standards announced by the decision below will likely govern all, or nearly all, cases raising similar issues in the future, because venue in such suits will generally lie within the Second Circuit. In view of the significance of the issues, and the danger that permitting misdirected antitrust class actions to proceed could chill legitimate activity in our Nation's vitally important financial markets, the petition for a writ of certiorari should be granted.

I. THE COURT OF APPEALS FAILED TO AFFORD APPROPRIATE PROTECTION TO CONDUCT THAT IS INEXTRICABLY LINKED TO LEGITIMATE COLLABORATIVE UNDERWRITING ACTIVITY

The "proper approach" to a claim of antitrust immunity on the basis of another regulatory statute "is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver* v. *NYSE*, 373 U.S. 341, 357 (1963). See Pet. App. 49a-50a (quoting same). Reconciling the strictures of the federal antitrust laws with federal regulatory policy is especially important when, as here, the regulatory scheme authorizes competitors to collaborate in ways that might otherwise violate the antitrust laws and provide a ready basis for alleging such violations. *Silver*, 373 U.S. at 360 (noting that the securities law's "policy of self-regulation" necessarily "contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction" by the securities laws).

Applying the proper framework, the antitrust laws should be understood as having been impliedly repealed with respect to authorized collaboration among underwriters in the IPO process. The system of syndicated underwriting is "an essential means" by which underwriters manage and share risks in underwriting public securities offerings. Pet. App. 5a. It "inherently involves agreements and joint actions among potential competitors, including agreements about price that, but for the securities regulatory regime, would raise substantial antitrust concern." *Id.* at 192a.[3] Congress was well aware

[3] Among other things, the "lead underwriter in a syndicate must assess the appropriate issue quantity and pricing for the IPO," which is "a difficult task, in which the lead underwriter is aided in part by 'book building.'" Pet. App. 6a (citations omitted). As part of the authorized book building process, the underwriters discuss price and demand with the issuer and potential investors,

of the syndicated underwriting system when it enacted the Securities Act of 1933 and the Securities Exchange Act of 1934, and the legislative and regulatory history demonstrates that Congress chose regulation rather than prohibition. See generally *id.* at 4a-16a, 133a-136a. Collaborative activity in the formation and operation of underwriting syndicates must therefore be deemed immune from challenge under the antitrust laws.

Moreover, contrary to the view seemingly expressed by the court of appeals, that immunity encompasses activities that are directly related to and cannot practically be separated from authorized conduct. See *NASD*, 422 U.S. at 733-734 (holding immune a horizontal agreement to implement approved vertical distribution rules).[4] Failure to recognize immunity for activities that are inextricably intertwined with permissible collaborative conduct could effectively vitiate the immunity for the authorized conduct and thus conflict with the regulatory scheme.[5]

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agree on the size and pricing of the offering, and decide how to allocate the shares. See generally *id.* at 4a-16a.

[4] Courts apply an analogous approach to immunity in other contexts. Under the *Noerr-Pennington* doctrine, for example, petitioning the government to take anticompetitive action does not violate the antitrust laws. A media campaign intended to influence the government is also immune, although its incidental effects may directly injure competitors. See *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 142-143 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669-670 (1965). See also *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 499 (1988). Similarly, a prosecutor's governmental immunity from civil damages extends to activities "intimately associated with the judicial phase of the criminal process." *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976). See also *Nixon* v. *Fitzgerald*, 457 U.S. 731, 756 (1982) (absolute presidential immunity for acts within the "outer perimeter" of president's official responsibility).

[5] Of course, the mere fact that conduct violating the antitrust laws occurs in connection with permissible and immune conduct is not sufficient to require dismissal on immunity grounds. For example, competitors who agreed to fix prices cannot claim immunity under *Noerr* merely because they also had

The decision of the court of appeals fails to make sufficient accommodation for the securities laws' policy of encouraging certain types of collaborative activity. As the government's amicus filings in the lower courts emphasized, many of the more specific factual allegations in the complaint describe accepted practices of underwriters that the SEC permits, and in some instances encourages, as part of the capital formation process—including combining into underwriting syndicates; collaborating as members of trade associations and exchanges; agreeing that the lead underwriter will distribute all the shares and that all syndicate members will share in the underwriters' discount; holding meetings of investment bankers, legal officers, and market makers; and disclosing information about each underwriter's IPO customers. See Pet. App. 154a-155a, 177a, 206a-207a (referring, in particular, to specific conduct alleged in Am. Compl. ¶¶ 38, 39, 45-48, 56, 62). That conduct is immune from antitrust scrutiny, as is any related conduct that cannot practicably be separated from it.

Although the court of appeals recognized that "the complaint details a host of conduct recognized as legitimate by the SEC," Pet. App. 61a n.47, it did not treat the presence of such allegations as raising a question of immunity. Indeed, the court erroneously held that the implied immunity issue is conclusively resolved in respondents' favor merely because the complaint alleges, in rather conclusory fashion, certain conduct that is forbidden by the securities laws. See *id.* at 70a ("find[ing] no repeal" of the antitrust laws and remanding only for consideration of "alternate grounds" for dismissal).

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legitimate discussions about an industry position on price control legislation at the same meeting. See *In Re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 788-789 (7th Cir. 1999), cert. denied, 528 U.S. 1181 (2000). Rather, the court must inquire whether the challenged conduct can practicably be separated from, or is instead inextricably intertwined with, the permissible conduct.

The court treated the presence of allegations relating to legitimate collaboration as raising only questions regarding what *evidence* respondents could rely upon to support their antitrust claims. See *id.* at 61a n.47 ("[W]e leave to the district court the task of ensuring that defendants do not suffer prejudice from any evidence of their legitimate activities.").

The problem presented by the complaint's reliance on protected conduct is more fundamental than the court of appeals appreciated. When a complaint merely combines a conclusory allegation that the defendants engaged in impermissible anticompetitive conduct with more detailed allegations of collaborative conduct authorized by a regulatory scheme—or activities inextricably intertwined with such conduct—the complaint does not suffice to overcome the immunity defense. Rather, the complaint must allege facts providing concrete notice and giving rise to a reasonably grounded expectation, see *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005), that the alleged antitrust offense can be established without relying on activities that are authorized under the regulatory scheme or inextricably intertwined with such immune activities. The district court must, therefore, use its "power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983).[6] And it should not permit discovery to go forward as a fishing

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[6] The district court has "inherent power to narrow the issues for trial and require the plaintiff to state with more specificity the factual allegations supporting the claim." *Marx* v. *Gumbinner*, 855 F.2d 783, 792 (11th Cir. 1988). The court may also grant motions for more definite statements or to strike immaterial allegations. See Fed. R. Civ. P. 12(e) and (f); *Elliott* v. *Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985). See also *United States* v. *Georgia*, 126 S. Ct. 877, 882 (2006) (after complaint is amended, the lower courts can determine which aspects of the alleged conduct would violate the Constitution or the relevant statute and the extent to which that conduct is protected by sovereign immunity).

expedition based on conclusory or ambiguous allegations that focus on protected conduct.[7] See generally U.S. Br., *Bell Atlantic Corp.* v. *Twombly*, 126 S. Ct. 2965 (2006) (No. 05-1126).

In this case, it is particularly difficult to discern whether respondents have adequately pleaded non-immune anticompetitive conduct sufficient to overcome the immunity defense, because the allegations of forbidden tie-in and laddering agreements are largely confined to more conclusory assertions in the background section of the complaint, whereas the more specific factual allegations concerning the alleged unlawful agreements detail conduct that is (or might be) immune.

For example, in their "Summary of Allegations," Am. Compl. 1, respondents allege that petitioners "agree[d] to require that, in order to obtain IPO shares of a Class Security, customers had to place bids for and/or purchase quantities of such Class Security in the aftermarket at prices above the IPO price in order to systematically and significantly inflate the after-market prices of IPOs—a practice known as 'laddering.'" *Id.* ¶ 7. However, in the section of the complaint headed "The Making and Implementation of Defendants' Unlawful Agreement," *id.* at 19, which lays out the specific acts petitioners are alleged to have taken in connection with the unlawful agreements, the more specific allegation regarding "laddering" is that during "road shows" and other communications with customers before the IPOs, petitioners "at times jointly, made inquiries of customers or others interested in purchasing Class Securities concerning the number

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[7] If the complaint is not dismissed outright, the court should exercise the power to manage this complex action, see Fed. R. Civ. P. 16(c)(12); to limit the scope and intrusiveness of discovery, see Rule 26; to grant summary judgment at any time, see Rule 56(a); and to exclude evidence of protected conduct as irrelevant or unduly prejudicial, see Fed. R. Evid. 402, 403; cf., *e.g.*, *United States Football League* v. *NFL*, 842 F.2d 1335, 1374-1375 (2d Cir. 1988) (evidence of lobbying subject to *Noerr-Pennington* doctrine properly excluded from antitrust case because more prejudicial than probative).

of shares that such person would be willing to purchase in the aftermarket and the prices such person would be willing to pay for such shares." *Id.* ¶ 54. That allegation is sufficiently vague that it encompasses permissible book-building conduct between underwriters and investors that the SEC has specifically approved as important in determining the size and price of the offering as well as the allocation of shares, based on understanding long-term investor interest in and valuation of the company. See Pet. App. 227a-228a (SEC's April 2005 guidance specifically authorizing inquiries "as to customers' desired future position in the longer term (for example, three to six months) and the price or prices at which the customer might accumulate that position," while clarifying that "inquir[ing] whether the customer intends to place orders in the immediate aftermarket, and if so, at what prices and quantities" is prohibited as an impermissible tie-in).

The court of appeals should have undertaken, or directed the district court to undertake on remand, a "fairly fact-specific inquiry," *Friedman* v. *Salomon/Smith Barney, Inc.*, 313 F.3d 796, 799 (2d Cir. 2002), cert. denied, 540 U.S. 822 (2003), to determine whether the allegations of non-immune conduct in respondents' complaint impermissibly rest on the complaint's more specific assertions of legitimate and immune conduct. In view of the complaint's extensive reliance on allegations of immune conduct, the court of appeals erred in categorically rejecting petitioners' immunity defense.

II. PETITIONERS ERR IN CONTENDING THAT IMPLIED IMMUNITY SHIELDS ALL CONDUCT RELATING TO INITIAL PUBLIC OFFERINGS

Although, as discussed above, the court of appeals failed to give adequate protection to collaborative conduct that is permitted under the securities laws, the district court and petitioners are also wrong in their view that all conduct connected with initial public offerings is impliedly immune from antitrust liability because the SEC exercises "pervasive" reg-

ulatory authority over it. See Pet. 5, 9-10, 18, 21-24, 27. As this Court has instructed, "a cardinal principle of construction [is] that repeals by implication are not favored," *Silver*, 373 U.S. at 357 (quoting *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939)), and "can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system," *NASD*, 422 U.S. at 719-720; *National Gerimed.*, 452 U.S. at 388. "Repeal is to be regarded as implied only if necessary to make the [regulatory statute] work, and even then only to the minimum extent necessary." *Silver*, 373 U.S. at 357.[8] Contrary to petitioners' theory, therefore, the Court has rejected the view that all conduct regulated under another statutory scheme enjoys "a blanket exemption" from antitrust law. *National Gerimed.*, 452 U.S. at 392. See also *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372 (1973) ("[a]ctivities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws").[9]

Notably, the Court did not apply petitioners' sweeping rule of implied repeal in either *Gordon* or *NASD*, each of which involved conduct regulated by the SEC. In *Gordon*, private plaintiffs sought treble damages for the fixing of commissions pursuant to exchange rules. The Court did not hold that the SEC's regulatory authority was so "pervasive" that it impliedly repealed all antitrust liability. 422 U.S. at 688-

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[8] Indeed, even express statutory exemptions are narrowly construed. See, *e.g.*, *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966).

[9] In *Otter Tail*, there was no implied immunity because "nothing in the legislative history [of the Federal Power Act] * * * reveal[ed] a [congressional] purpose to insulate electric power companies from the operation of the antitrust laws." 410 U.S. at 373-374. Similarly, in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), the Court held that the Bank Merger Act of 1960, which required the Comptroller of the Currency to review and approve certain bank mergers under a public interest standard, did not provide antitrust immunity for approved mergers because there was no evidence that Congress intended to oust antitrust enforcement. *Id.* at 352.

689. Rather, the Court focused on the fact that Congress had specifically granted the SEC "the power to fix and insure 'reasonable' rates" of commission, *id.* at 666, and the SEC, which had "thoroughly exercised its supervisory powers" over the system of fixed commissions, *id.* at 668, had effectively authorized the use of fixed rates during the time period at issue in the complaint. *Id.* at 667-675, 689-690. As the Court explained, the SEC's approval of fixed rates was "not significantly different" from "an affirmative order to the exchanges to follow fixed rates." *Id.* at 689 n.13. Fixed commissions were not prohibited by the SEC until 1975, several years *after* the suit was filed. *Id.* at 660, 675.

Similarly, in *NASD* the Court reviewed the legislative history of the securities statute and found that the challenged vertical restrictions on mutual fund sales and distributions were "among the kinds of restrictions Congress contemplated when it" granted the SEC authority to approve such rules. 422 U.S. at 721. The SEC exercised a significant oversight function, and its decision not to prohibit the restrictions reflected the Commission's approval of those restrictions and of the challenged NASD rules and interpretations. *Id.* at 728, 733. That authorization, contemplated by Congress, could not be reconciled with application of the antitrust laws, under which the restrictions would have been illegal per se. *Id.* at 729, 733. Although the efforts of NASD members to encourage the kinds of restraints at issue were not themselves specifically required or approved, that conduct also was immune because it was "designed to encourage * * * precisely the restriction that the SEC consistently ha[d] approved pursuant to [statute] for nearly 35 years." *Id.* at 733. Certainly, nothing in *Gordon* or *NASD* supports petitioners' view that anticompetitive conduct that is and always has been forbidden under the securities laws is nonetheless categorically immune from liability under the antitrust laws.

Petitioners' ultimate argument (Pet. 27-28) is that the Court should, as an exercise of judicial policymaking, confer broad antitrust immunity for conduct relating to the securities markets because, in petitioners' view, the prospect of treble damages awards by federal juries applying the antitrust laws will unduly disrupt the capital formation process. While those concerns are legitimate and counsel in favor of both extending immunity beyond the scope acknowledged by the court of appeals and carefully scrutinizing complaints, see pp. 10-15, *supra*, to the extent petitioners seek a blanket immunity, such arguments are properly directed to Congress, not the courts. Congress has enacted various express antitrust exemptions, and has placed restrictions on certain types of actions under the securities laws,[10] but as yet it has not chosen to confer the blanket immunity from antitrust liability that petitioners urge. Congress, moreover, has the flexibility to tailor express immunity to serve the ends of both the securities and antitrust laws, for example, by conferring immunity from treble damages suits while allowing the Justice Department to bring enforcement actions. As the court of appeals correctly recognized (Pet. App. 70a), it is not the place of the courts to confer broad immunity from enforcement of the antitrust laws absent evidence that Congress intended that result.[11]

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[10] See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737; Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227.

[11] The Department of Justice cooperates with the SEC to identify and address potential violations of the antitrust laws, as well as related competitive concerns under the securities laws. The Department has brought antitrust enforcement actions against, for example, anticompetitive agreements related to conventions for quoting stock prices, see *Stipulation and Order and Competitive Impact Statement*, United States *v.* Alex. Brown & Sons, Inc., 61 Fed. Reg. 40,439 (1996), and hedge fund trading of U.S. Treasury notes, see *Proposed Final Judgment and Competitive Impact Statement*, United States *v.* Steinhardt Mgmt. Co., 60 Fed. Reg. 3263-3264 (1995). The Department also

III. THIS COURT SHOULD PROVIDE THE LOWER COURTS WITH GUIDANCE ON HOW TO RECONCILE THE ANTITRUST AND SECURITIES LAWS

This case involves the reconciliation of two federal statutes critical to the efficient functioning of our economy. The federal antitrust laws seek to further "our fundamental national economic policy" of competition, *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 372 (1963), while the securities laws regulate and ensure the integrity of the engine of capital formation.

A standard permitting antitrust actions to proceed on the basis of alleged conduct that cannot practicably be separated from legitimate collaborative activities approved under the regulatory regime governing public securities offerings could undercut critical national regulatory policies and interfere with the capital formation process. The decision below threatens just such a result. The court of appeals erred by failing to grant implied immunity with respect to conduct inextricably intertwined with approved conduct and by rejecting petitioners' immunity defense without regard to whether respondents' conclusory allegations of unlawful conduct ultimately rest on the complaint's more particular allegations of conduct that is authorized or even encouraged by the SEC. On the other hand, the sweeping antitrust immunity endorsed by the district court and urged on this Court by petitioners would oust not only private treble damages actions but government antitrust enforcement from the securities industry, despite the absence of any evidence that Congress intended such a drastic result.

The Court could provide much-needed certainty in this critical area by granting the petition and clarifying the proper

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investigates joint ventures and acquisitions in the securities industry. The Department's enforcement of antitrust laws in the securities context has saved consumers billions of dollars.

standard of immunity. That action, combined with the Court's clarification of the pleading standards in *Twombly*, could do much to provide essential guidance in this area of the law. In sum, the Court should grant certiorari so that these two critically important statutory schemes will be reconciled in a manner that gives effect to each, "rather than holding [either] one completely ousted," *National Gerimed.*, 452 U.S. at 392.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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